Supreme Court, U.S.
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(3)

No. 99-1476

In The

Supreme Court of the United States

GREGORY ARTHUR OTT,

Petitioner,

v.

GARY L. JOHNSON, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, INSTITUTIONAL DIVISION,

Respondent.

On Petition For Writ Of Certiorari To The Fifth Circuit Court Of Appeals

SUPPLEMENTAL BRIEF ON PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

WHETHER 28 U.S.C. § 2244(d)(2), WHICH TOLLS THE LIMITATIONS PERIOD FOR FILING A FEDERAL HABEAS PETITION FOR "STATE POST-CONVICTION OR OTHER COLLATERAL REVIEW," INCLUDES THE NINETY DAYS IN WHICH A STATE HABEAS PETITIONER MAY FILE A PETITION FOR WRIT OF CERTIORARI IN THIS COURT?

WHETHER EQUITABLE TOLLING OF THE STATUTE OF LIMITATIONS IN 28 U.S.C. § 2244 MAY BE DENIED A STATE INMATE FOR WHOM TIMELY FILING OF THE PETITION IN FEDERAL COURT WAS RENDERED IMPOSSIBLE BY IRREGULAR STATE COURT NOTICE OF DECISION?

WHETHER BRIEFING OF ISSUES ON APPEAL PROVIDES SUFFICIENT NOTICE TO A CIRCUIT COURT FOR EXPANSION OF A CERTIFICATE OF APPEALABILITY?

INTERESTED PARTIES

1. Gregory Arthur Ott, Petitioner.

2. Gary L. Johnson, Director, Texas Department of Criminal Justice, Institutional Division, Respondent.

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SUPPLEMENTAL ARGUMENT

1. The Fifth Circuit's decision is in conflict with newly released "equitable tolling" decisions of federal district courts in at least two other Circuits by holding that failure to file within the limitations period was attributable to the petitioner when, but for a court's failure to provide notice within the statutory period of limitations, filing would have been timely.

This Court permits supplementation of a petition for writ of certiorari in order to call attention to "new cases . . . not available at the time of the party's last filing." Rule 12, Paragraph 8, Rules of the Supreme Court of the United States. Ott's petition was filed by the printer[1] in this Court on March 2, 2000. On March 2nd and 3rd, two cases were issued by federal district courts that have an important bearing upon Ott's second question presented regarding "equitable tolling." *See Hunter v. Greiner*, 2000 WL 245864 (S.D.N.Y. March 3, 2000) (**Appendix A**); *Brandon v. United States*, 2000 WL 245703 (E.D. Va. March 2, 2000) (**Appendix B**).

The Texas Court of Criminal Appeals' "white card" notice of its denial of Ott's state post-conviction petition was not received by Ott until after the statute of limitations in 28 U.S.C. § 2244(d)(2) had run, making it impossible for him to timely file his first and only federal petition for writ of habeas corpus under 28 U.S.C. § 2254. *See* Petition for Writ of Certiorari at 7, 9, 24, and App. 4. Ott

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[1] Cockle Law Brief Printing Co., 2311 Douglas Street, Omaha, Nebraska 68102-1283; 1-800-225-6964. Cockle express mailed the petition in the U.S. mail system, for next day delivery, to the Clerk of this Court on March 1, 2000.

filed his state post-conviction petition on April 23, 1997, one day before his "grace period" would expire for filing the federal petition. *Id.* at 7. No answer was filed by the State and no evidentiary hearing was held by the State district court. When the district court passed the case on to the Texas Court of Criminal Appeals, undersigned counsel filed a pre-submission brief in the Court of Criminal Appeals pointing out the necessity of an evidentiary hearing due to the allegations in the petition. The Court of Criminal Appeals did not communicate with Ott or the undersigned until it mailed the "white card" notifying Ott and counsel that it had "denied without written order" Ott's petition on Wednesday, September 17, 1997. The "white card" was postmarked on Thursday, September 18, 1997. With one day left, the statute of limitations ran on Friday, September 19, 1997. The "white card" arrived via the mail at the undersigned counsel's office on Saturday, September 20, 1997. Counsel sent Ott's federal petition for writ of habeas corpus by Federal Express on Monday, September 22, 1997, to the United States District Court, Southern District, Houston Division, where it was filed on September 23, 1997. *See id.* at 9.

The district courts in *Hunter* and *Brandon* would have equitably tolled Ott's statute of limitations, allowing timely filing of his federal petition. Both stand for the proposition that "[w]here a petitioner, through no fault of his own, first learns of the outcome of a final appeal after the time for seeking habeas has expired, equitable tolling is appropriate." *Hunter*, 2000 WL 245864, at *3 (Supp. Br. 7) (citing *Vasquez v. Greiner*, 68 F. Supp. 2d 307, 309 (S.D.N.Y. 1999); *McCoy v. Walker*, 99 Civ. 3926, 1999 WL 1191988, at *6 (S.D.N.Y. Dec. 14, 1999); *Miller v. New Jersey*

State Dep't of Corrections, 145 F.3d 616, 618-19 (3d Cir. 1998); *Davis v. Johnson*, 158 F.3d 806, 811 (5th Cir. 1998));[2] *see Brandon*, 2000 WL 245703, at *3 (citing *Baskin v. United States*, 998 F. Supp. 188, 190 (D. Conn. 1998); *Vasquez*, 68 F. Supp. 2d at 310)).

The District Court for the Southern District of New York held in *Hunter* that "[e]quitable tolling is [ ] warranted when a petitioner is effectively prevented from timely pursuit of habeas relief." *Hunter*, 2000 WL 245864, at *3 (Supp. Br. 8). The Court noted, however, that equitable tolling generally would not be available when "the claimant failed to exercise due diligence in preserving his legal rights." *Id.* (citing *Irwin v. Dep't of Veterans Affairs*, 498 U.S. 89, 96 (1990). The "question" for the Court, therefore, was whether Hunter had acted with reasonable diligence to inquire into the outcome of his State post-conviction petition, so as to preserve his right to file in federal court. *Id.* at *4 (Supp. Br. 8). The § 2244 tolling period began to run when Hunter's time to file a petition for certiorari to this Court expired on or about August 16, 1997. *Id.* at *2 (Supp. Br. 5). He filed a State application for writ of coram nobis on May 12, 1998, tolling the statute of limitations until the application was denied on November 5, 1998. *Id.* at *2-*3 (Supp. Br. 6). The limitations period ran on February 9, 1999. *Id.* Hunter received a copy of the State court's order denying his application for writ of coram nobis by mail on March 25, 1999. *Id.* He filed his federal petition almost a month after receiving notice, on

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[2] *See* Petition for Writ of Certiorari at 26 (pointing out the sharp contrast between Ott's case and *Davis* within the same Circuit).

April 19, 1999. *Id.* at *4 (Supp. Br. 8). In defense against the Respondent's assertion of the statute of limitations, Hunter argued that the statute "should be tolled an additional four-and-a-half months during which he was unaware of the disposition of his petition for a writ of error coram nobis, thereby giving him until approximately June 23, 1999 to file." *Id.* at *3 (Supp. Br. 7). Noting that it must decide whether Hunter acted with reasonable diligence in allowing ten months to elapse (May 12, 1998 until March 25, 1999) "apparently without inquiring as to the outcome of his application," the district court held, "**[b]ased on this record, I am unable to assess the reasonableness of petitioner's conduct. I will therefore assume that he acted with reasonable diligence.**" *Id.* at *4 (Supp. Br. 8) (emphasis added). As a result, the district court applied equitable tolling and held that Hunter's petition was not time-barred. *Id.* There is nothing in the record in Ott's case, either, that suggests Ott "slept on his rights" or demonstrated anything less than the most reasonable diligence in following his case through the Texas post-conviction system. Additionally, unlike Hunter, who filed more than two months outside the limitations period and almost one month[3] after receiving notice, Ott filed his federal petition **immediately** upon receiving notice by mail that he had been denied relief in the State court.

The district court's opinion in *Brandon* is even more supportive of Ott's right to equitable tolling. This Honorable Court, in fact, is the court in *Brandon* that apparently

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[3] The petitioner in *Hunter* appears to have been unrepresented by counsel.

did not inform the petitioner of a decision that caused the limitations period to run until timely filing was no longer possible. Brandon's petition for writ of certiorari on direct appeal from a federal conviction was denied by this Court on May 13, 1996, causing the limitations period to begin to run. Brandon's § 2255 motion was filed on September 10, 1998, more than a year after the one-year window for filing had closed on May 13, 1997. *Brandon*, 2000 WL 245703, at *1 (Supp. Br. 20). In response to the Government's argument that the petition was time-barred, Brandon urged that the statute should be equitably tolled "because neither he, nor his counsel, were notified of [this Court's] denial of certiorari until September 10, 1997, and the instant petition was filed within one year of that date." *Id.* at *3 (Supp. Br. 23). The district court made the following findings:

> 1. Brandon's direct review counsel "averred that he was not notified of the denial of certiorari" until he contacted this Court on September 10, 1997. *Id.* (Supp. Br. 24).
>
> 2. Brandon's post-conviction counsel averred that, in August 1998, he reviewed this Court's file of Brandon's codefendant, finding a copy of notice of denial of certiorari sent to the codefendant, but "no correspondence or other documentation in the file indicat[ing] that [Brandon] or his counsel were notified of the denial of certiorari." *Id.* (Supp. Br. 24).
>
> 3. "The government [did] not refute the fact that petitioner did not receive either actual or constructive notice of the denial of certiorari until after the limitations period expired." *Id.* (Supp. Br. 24).

The district court held that, because Brandon, "through no fault of his own, first learned of the outcome of his final appeal after the time for seeking habeas review had expired, equitable tolling [was] appropriate." *Id.* at *4 (Supp. Br. 24). In so holding, the district court rejected unsupported argument by the Government, like that which has been made in Ott's case, that because the court's decision was public record (which the Government argued could have been accessed at any time before the limitations period expired) equitable tolling was not warranted. *Id.* (Supp. Br. 25). The court found that the Government's argument led to an "absurd result": "courts would have no reason to provide notice of their decisions in these matters because prisoners, like petitioner, who have no meaningful access to court records, would be deemed to know the contents of such records." *Id.* (Supp. Br. 25).

Nothing in the record below suggests that Ott had such "meaningful access to court records" that he should be held accountable for failure to file within the limitations period. Ott must be presumed to have acted with reasonable diligence, given the fact that he was ready to file (and did file) his federal petition immediately upon receiving notice of the state court's decision. That notice arrived too late for Ott to comply with 28 U.S.C. § 2244(d), through no fault of his own. The new cases suggest that Ott would have found his case equitably tolled in other district courts, reflecting an uneven administration of justice, and a potential for circuit conflict over the relationship between notice and the statutory deadline in § 2244(d) for equitable tolling purposes.

CONCLUSION

The petition for writ of certiorari should be granted to address these issues of nationwide significance.

Respectfully submitted,

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APPENDIX A

Terrance HUNTER, Petitioner,

v.

Charles GREINER, Respondent.

No. 99 CIV. 4191(SAS).

United States District Court, S.D. New York.

March 3, 2000.

Terrance Hunter, Sing Sing Correctional Facility, Ossining, for Petitioner (Pro Se).

Rebecca Ann Durden, Assistant Attorney General, New York, for Respondent.

OPINION AND ORDER

SCHEINDLIN, D.J.

Petitioner Terrance Hunter ("Hunter" or "petitioner"), proceeding pro se, seeks a writ of habeas corpus pursuant to 28 U.S.C. § 2254, challenging his 1995 conviction on two counts of criminal possession of a controlled substance in the first and third degrees. *See* Amended Petition for Writ of Habeas Corpus, ("Hunter Pet."), dated July 22, 1999, at 2. Hunter challenges his conviction on four grounds: (1) the trial court altered its *Sandoval* ruling, thereby prejudicing petitioner; (2) the trial court erroneously admitted evidence obtained pursuant to an unreasonable search and seizure; (3) the trial court erroneously admitted evidence obtained pursuant to petitioner's unlawful arrest; and (4) ineffective assistance of appellate counsel. *See id.* at 5-6. For the reasons set forth below, the petition is denied.

I. Factual Background

At approximately 7:53 p.m. on August 28, 1994, New York City police officers Edward Browne ("Browne"), Michael Roberts ("Roberts"), and Robert Aguilar ("Aguilar") were on routine patrol in their unmarked police car when they received a radio transmission that two black men were selling guns out of a black Honda Accord with Alabama license plates at a particular location. *See Mapp/Sandoval* Hearing Transcript ("H") at 6-7; Trial Transcript ("T"), April 19, 1995, at 35. The officers drove to the location where they saw a parked dark blue Honda Accord, but no one was near or inside the vehicle. *See* T at 36-37. Approximately fifteen minutes later, the officers saw petitioner enter the car. *See id.* at 43. The officers then drove up to the car. *See id.* Just before they stopped in front of the vehicle, the officers turned on their police siren and flashing lights. *See* H at 10.

Upon seeing the police car approach, petitioner jumped out of the Honda and fled down the street. *See id.* at 11-12; T at 45. Officers Roberts and Browne immediately gave chase. *See* T at 45-46. Officer Browne saw petitioner run by a church where a crowd of people were attending an outdoor service and throw a package to the ground. *See id.* at 47-49. The officers continued to chase petitioner who was eventually stopped a few blocks away. *See id.* at 60. The officers handcuffed petitioner, frisked him and then returned to the church to retrieve the package. It contained approximately one kilogram of cocaine in brick form and wrapped in clear cellophane. *See id.* at 61-64. The officers also recovered $3,514 in cash from petitioner's right front pocket. *See* T, April 20, 1995, at 123-24.

II. Procedural History

Petitioner was charged with criminal possession of a controlled substance in the first and third degrees. *See* N.Y. Pen. Law §§ 220.21(1) and 220.16(1) (McKinney 2000). On April 17, 1995, a combined Mapp/Sandoval hearing was held in New York State Supreme Court, New York County, on petitioner's motion to suppress the physical evidence, specifically the cash and the cocaine, and to limit cross-examination regarding several prior convictions. The court denied petitioner's motion, ruling that the conduct of the officers did not violate his constitutional rights. The court also ruled that the prosecution could cross-examine petitioner regarding the fact of his prior convictions, but not as to the substance of the offenses underlying those convictions. *See* H at 47-52. On April 24, 1995, a jury convicted Hunter of both counts of criminal possession of a controlled substance. *See* T at 390. On May 15, 1995, Hunter, a second felony offender, was sentenced to concurrent terms of ten to twenty years and fifteen years to life. *See Hunter* Pet. at 2. He is currently incarcerated at Sing Sing Correctional Facility in Ossining, New York.

Petitioner appealed his conviction to the Appellate Division, First Department, alleging that: (1) the trial court erred in refusing to suppress the physical evidence; (2) the prosecution failed to prove the required elements of knowledge and possession as to the crimes charged; (3) the trial court failed to properly instruct the jury that he should be acquitted in the event the prosecution failed to satisfy its burden of proving each and every element of the crimes charged; (4) the trial court altered its prior *Sandoval* ruling, thereby prejudicing Hunter; (5) the trial

court deprived Hunter of a fair trial by failing to question a juror regarding potential bias, and; (6) Hunter's sentences were unduly harsh and excessive. *See* Declaration in Opposition ("Opp.Decl."), Ex. B, Brief for Defendant-Appellant, at 6-8. Petitioner was represented by counsel on the appeal. On January 30, 1997, the Appellate Division affirmed petitioner's conviction. *See People v. Hunter*, 653 N.Y.S.2d 319 (1st Dep't 1997). Petitioner sought leave to appeal to the Court of Appeals which was denied on May 16, 1997. *See People v. Hunter*, 89 N.Y.2d 1094 (1997).

Petitioner then applied pro se to the Appellate Division for a writ of error coram nobis on May 12, 1998, alleging ineffective assistance by his appellate counsel in failing to raise the following claims: (1) the trial court erroneously "injected its own interpretation of the evidence," and; (2) state prosecutors "surreptitiously changed their theory on appeal." *See Hunter* Pet. at 3-4. This application was denied on November 5, 1998. *See People v. Hunter*, 683 N.Y.S.2d 688 (1st Dep't 1998).

III. Discussion

A. Is Hunter's Petition Time-Barred?

Petitioner filed for a writ of habeas corpus pursuant to 28 U.S.C. § 2254 on April 19, 1999. By Order dated June 11, 1999, this Court directed petitioner to show cause as to why his petition was not untimely under the Antiterrorism and Effective Death Penalty Act ("AEDPA"), 28 U.S.C. § 2244(d). AEDPA, signed into law on April 24, 1996, provides in relevant part:

> (1) A one-year period of limitation shall apply to an application for a writ of habeas corpus by

> a person in custody pursuant to the judgment of a State court. The limitation period shall run from the latest of –
>
> (A) the date on which the judgment became final by the conclusion of direct review or the expiration of the time for seeking such review;

28 U.S.C. § 2244(d)(1)(A). AEDPA further provides in relevant part:

> (2) The time during which a properly filed application for State post-conviction or other collateral review with respect to the pertinent judgment or claim is pending shall not be counted toward any period of limitation under this subsection.

28 U.S.C. § 2244(d)(2).

The following chronology is relevant. Petitioner was sentenced on May 15, 1995, and his conviction was affirmed on January 30, 1997. On May 16, 1997, the New York Court of Appeals denied petitioner leave to appeal to the state's highest court. *See People v. Hunter*, 89 N.Y.2d 1094 (1997). Thus, petitioner's judgment became final on or about August 16, 1997, when his time to file a petition for certiorari to the United States Supreme Court expired. *See Hughes v. Irvin*, 967 F.Supp. 775, 778 (E.D.N.Y.1997) (petitioner's judgment became final 90 days after the New York Court of Appeals denied him leave to appeal) (citing Rule 13 of Rules of the Supreme Court of the

United States).[1] Petitioner filed an application for a writ of error coram nobis on May 12, 1998. His application was denied on November 5, 1998. Petitioner asserts, however, that he did not learn of this denial until at least March 25, 1999, when he received a copy of the decision by mail. *See* Petitioner's Affirmation ("Pet.Aff."), dated July 6, 1999, at 1-2.

Pursuant to 28 U.S.C. § 2244(d)(2), petitioner's application for a writ of error coram nobis tolled the statute of limitations from May 12, 1998 until November 5, 1998. Thus, the three months left between May 12, 1998 and August 16, 1998 began to run again on November 5, 1998. Therefore, if petitioner had been timely notified of the denial, he should have filed his habeas petition on or about February 9, 1999. However, petitioner argues that the statute of limitations should be tolled an additional four-and-a-half months during which he was unaware of the disposition of his petition for a writ of error coram

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[1] Rule 13 of the United States Supreme Court provides in part:

> (1) Unless otherwise provided by law, a petition for a writ of certiorari to review a judgment in any case, civil or criminal, entered by a state court of last resort or a United States court of appeals (including the United States Court of Appeals for the Armed Forces) is timely when it is filed with the Clerk of this Court within 90 days after entry of the judgment. A petition for a writ of certiorari seeking review of a judgment of a lower state court that is subject to discretionary review by the state court of last resort is timely when it is filed with the Clerk within 90 days after entry of the order denying discretionary review.

nobis, thereby giving him until approximately June 23, 1999 to file.

The word "pending" in § 2244(d)(2) refers to the period of time during which a motion is pending but not yet decided. *See Bennett v. Artuz*, 199 F.3d 116, 119 (2d Cir.1999) (holding that a state court petition is "pending" from the time it is filed until the time it is finally disposed of and further appellate review is unavailable under state procedures); *see also Shin v. Walker*, 97 Civ. 7048, 1999 WL 345285, at *1 (E.D.N.Y. May 24, 1999) ("the word 'pending' in § 2244(d)(2) unambiguously refers to the period of time during which a motion has been filed but not yet decided") (citing *Geraci v. Senkowski*, 23 F.Supp.2d 246, 252 (E.D.N.Y.1998)). Thus, the toll generally expires when the motion is decided regardless of when the petitioner learns of that decision.

The next question, however, is whether the doctrine of equitable tolling should be applied under the circumstances. A number of courts have held that "[w]here a petitioner, through no fault of his own, first learns of the outcome of a final appeal after the time for seeking habeas has expired, equitable tolling is appropriate." *Vasquez v. Greiner*, 68 F.Supp.2d 307, 309 (S.D.N.Y.1999) (citing *Baskin v. United States*, 998 F.Supp. 188, 190 (D.Conn.1998)); *see also McCoy v. Walker*, 99 Civ. 3926, 1999 WL 1191988, at *6 (S.D.N.Y. Dec. 14, 1999) (holding that the language of 28 U.S.C. § 2244(d) is consistent with equitable tolling); *Miller v. New Jersey State Dep't of Corrections*, 145 F .3d 616, 618-19 (3d Cir.1998) ("the language [,] . . . legislative history . . . [and] statutory purpose of AEDPA [indicate] that Congress intended the one-year period of limitation to function as a statute of limitation

and be subject to equitable tolling"); *Davis v. Johnson*, 158 F.3d 806, 811 (5th Cir.1998) ("[I]n rare and exceptional circumstances, [AEDPA] can be equitably tolled").

Equitable tolling is thus warranted when a petitioner is effectively prevented from timely pursuit of habeas relief. Its use is typically available only when a petitioner "was prevented in some extraordinary way from exercising his rights." *Johnson v. Nyack Hosp.*, 86 F.3d 8, 12 (2d Cir.1996) (citation omitted). Equitable tolling will generally not be available where "the claimant failed to exercise due diligence in preserving his legal rights." *Irwin v. Dep't of Veterans Affairs*, 498 U.S. 89, 96 (1990). Petitioner was thus required to exercise reasonable diligence in following his application for a writ of error coram nobis.

The question, then, is whether petitioner acted with reasonable diligence in allowing ten months to elapse, from May 12, 1998 until March 25, 1999, apparently without inquiring as to the outcome of his application. *See Plowden v. Romine*, 99 Civ. 3752, 1999 WL 1281497, at *4 (E.D.N.Y. Dec. 29, 1999) (holding that it was unreasonable for petitioner to allow more than seventeen months to expire between the date on which he sought leave to appeal to the New York Court of Appeals and the date on which he inquired about the status of his request).

Based on this record, I am unable to assess the reasonableness of petitioner's conduct. I will therefore assume that he acted with reasonable diligence. As a result, I shall apply the doctrine of equitable tolling and hold that Hunter's petition, filed on April 19, 1999, is not time-barred.

B. Was Petitioner Prejudiced by the Court's Modification of its *Sandoval* Ruling?

Petitioner asserts that he was prejudiced and deprived of a fair trial when the trial judge altered its pre-trial *Sandoval*[2] ruling and allowed the state to cross-examine Hunter about his three prior felony convictions. Prior to trial, the trial judge held a *Sandoval* hearing and ruled that if petitioner testified, he could be questioned by the state about three prior felony convictions, but could not be impeached with the substance of the offenses underlying those convictions.[3] *See* H at 52. At trial, defense counsel requested a clarification of the ruling. *See* T, April 20, 1995, at 157. The court held that cross-examination would be limited to two prior felony convictions. *See id.* at 158.

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[2] On defendant's motion, the court must hold a pre-trial hearing during which it may make a prospective ruling limiting the prosecutor's cross-examination of defendant about any "prior specific criminal, vicious and immoral acts." *People v. Sandoval*, 34 N.Y.2d 371, 373 (1974).

[3] The relevant portion of the *Sandoval* hearing is as follows:

The Court: "[Hunter] has two felony convictions. You can allude to the fact that you have two felony convictions without going into the questions of what the underlying acts are."

[Prosecutor]: "It's three felonies."

The Court: "You can allude to the three felony convictions as such, nothing more . . . Three felonies is enough. It goes to the credibility and that's what it's supposed to be all about."

H at 52.

On direct examination, Hunter testified that he had been convicted of two felonies. *See* T, April 21, 1995, at 236.[4] At the close of the direct examination, the prosecutor requested that he be allowed to question Hunter about his third felony conviction. *See id.* at 259. Defense counsel objected, but without reopening the *Sandoval* hearing, the court agreed that Hunter had opened the door to such questioning by testifying that he had been convicted of only two felonies, and the state was not "limited to the *Sandoval* statement." *Id.*

The admission of a prior conviction in order to impeach the defendant is an evidentiary ruling and is only redressable in a federal habeas corpus proceeding if there is a showing that the particular errors were of constitutional magnitude. *See Benitez v. Senkowski*, 97 Civ. 7819, 1998 WL 668079, at *7 (S.D.N.Y. Sept. 17, 1998) (citations omitted). Evidentiary errors must be "so pervasive as to have denied [petitioner] a fundamentally fair trial." *Collins v. Scully*, 755 F.2d 16, 18 (2d Cir.1985).

A defendant may not deceive a jury under the guise of a pre-trial *Sandoval* ruling. *See People v. Santiago*, 564 N.Y.S.2d 412, 413 (1st Dep't 1991) ("A *Sandoval* ruling does not allow a defendant to deceive the jury and be free

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[4] The relevant portion of the trial testimony is as follows:

[Defense Counsel]: "Mr. Hunter, I am going to ask you, have you ever been convicted of a felony before?"

Hunter: "Yes, I have."

[Defense Counsel]: "How many times?"

Hunter: "Twice."

T at 236.

from confrontation, as a defendant who takes the stand is obliged to speak truthfully and accurately") (citations omitted).

> Although a court should not, ordinarily, modify a *Sandoval* . . . ruling once a defendant has taken the stand or prepared a defense in reliance thereon, such is not the case where . . . the latter has testified in a manner that is likely, in the absence of a modification, to mislead the jury with respect to the precluded evidence.

People v. Schwerbel, 638 N.Y.S.2d 198, 199 (3d Dep't 1996) (citations omitted). There is no requirement under either federal or state law that the trial court must re-open the pre-trial hearing or hold another hearing before amending its earlier ruling. *See id; see also Palmieri v. Defaria*, 88 F.3d 136, 139 (2d Cir.1996) (holding that an in limine evidentiary ruling is not a final ruling on admissibility and the district judge is entitled, in the exercise of sound judicial discretion, to alter a previous in limine ruling) (citation omitted).

Petitioner testified under oath that he only had two prior convictions. *See* T, April 21, 1995, at 236. The prosecutor was entitled to impeach this testimony. Furthermore, in asking petitioner at trial whether he had been convicted of a third felony, the prosecutor did not elicit any testimony concerning the underlying bases for the convictions. The trial court also specifically instructed the jury that this testimony was admitted for a limited purpose, namely credibility, and was not to be considered with respect to guilt or innocence. *See* T, April 24, 1995, at 367. The jury is presumed to have followed this cautionary instruction. *See Shannon v. United States*, 512 U.S. 573,

585 (1994). Accordingly, petitioner's writ of habeas corpus is denied on this ground.

C. Petitioner's Fourth Amendment Claims

Petitioner argues that the physical evidence presented at trial was obtained pursuant to: (1) an unconstitutional search and seizure, and (2) an unlawful arrest. *See Hunter* Pet. at 6. This Court is precluded from considering those claims for the following reasons.

In *Stone v. Powell*, 428 U.S. 465, 495 (1976), the Supreme Court held that "where the state has provided an opportunity for full and fair litigation of a Fourth Amendment claim, a state prisoner may not be granted federal habeas corpus relief on the ground that evidence obtained in an unconstitutional search or seizure was introduced at his trial." The issue, then, is whether Hunter was afforded an opportunity for full and fair litigation of his claims that his Fourth Amendment rights were violated. "[T]his circuit has developed a litmus test to determine when a state prisoner has been denied an opportunity for full and fair litigation of his fourth amendment claims." *Capellan v. Riley*, 975 F.2d 67, 70 (2d Cir.1992) (citing *Gates v. Henderson*, 568 F.2d 830, 840 (2d Cir.1977)). Review of such claims should be undertaken in only two instances: (1) if the state has provided no corrective procedures at all to redress the alleged Fourth Amendment violations; or (2) if the state has provided a corrective mechanism, but the defendant was precluded from using that mechanism because of an unconscionable breakdown in the underlying process. *See Capellan*, 975

F.2d at 71; *see also McPhail v. Warden*, Attica Correctional Facility, 707 F.2d 67, 70 (2d Cir.1983).

Neither of these exceptions apply here. First, New York does provide a statutory procedure for defendants to litigate Fourth Amendment search and seizure issues before trial. *See* N.Y.Crim. Proc. Law § 710 et seq. (McKinney 1995 & Supp.1999-2000). Petitioner cannot assert that this procedure is insufficient to redress his claims as courts in this circuit have expressly approved New York's procedure for litigating Fourth Amendment claims. *See Senor v. Senkowski*, 97 Civ. 4929, 1999 WL 689477, at *8 (E.D.N.Y. Aug. 31, 1999) (citing *Gates*, 568 F.2d at 837 n. 4)).

Second, petitioner is unable to demonstrate that "no state court . . . conducted a 'reasoned method of inquiry into relevant questions of fact and law' or any inquiry at all into [his] Fourth Amendment claim[s]." *Senor v. Senkowski*, 1999 WL 689477, at *9 (quoting *Shaw v. Scully*, 654 F.Supp. 859, 864 (S.D.N.Y.1987)); *Capellan v. Riley*, 975 F.2d at 71. Indeed, petitioner availed himself of New York's statutory procedure when he moved to suppress the admission of the cocaine and the $3,514 in cash at the Mapp hearing prior to his trial. *See Lipuma v. Commissioner*, Dep't of Corrections, 560 F.2d 84, 93 n. 6 (2d Cir.1977) (petitioner afforded opportunity for full and fair litigation when his Fourth Amendment claims were raised and argued before the state courts). At this hearing, held on April 17, 1995, the state court specifically reviewed the merits of petitioner's Fourth Amendment claims – that police stopped and seized him without the requisite reasonable suspicion, and that the police seized the contraband pursuant to an unreasonable search and

seizure. Officer Browne testified in great detail at this hearing about the search and seizure in issue. *See* H at 5-38. The trial court conducted a "reasoned method of inquiry into the relevant questions of fact and law," *Capellan v. Riley*, 975 F.2d at 71 (citations omitted), and found that both the cocaine and the money were admissible. *See* H at 49-51. Furthermore, petitioner appealed the trial court's denial of his motion to suppress to the Appellate Division which affirmed the trial court's ruling on the merits.

Petitioner has not shown that he was denied an opportunity to fully and fairly litigate his claim or that he was precluded from doing so because of an unconscionable breakdown in the underlying process. Rather, petitioner fully utilized the state's procedures to redress the alleged violation of his Fourth Amendment rights. Even if the Appellate Division erroneously decided the issue, a petitioner cannot gain federal review of a Fourth Amendment claim simply because a federal court may reach a different result. *See Capellan v. Riley*, 975 F.2d at 71. Petitioner's Fourth Amendment claims do not warrant habeas relief.

D. Was Petitioner Denied Effective Assistance of Appellate Counsel?

Petitioner alleges ineffective assistance of appellate counsel due to: the failure by his appellate counsel, Michael Sheinberg, who was also his trial counsel, to "argue that the hearing court erroneously failed to alert [the appellate] court that the People surreptitiously changed their theory on appeal." *Hunter* Pet. at 5.

Under the Sixth Amendment to the Constitution, "[i]n all criminal prosecutions, the accused shall enjoy the right . . . to have the Assistance of Counsel for his defense." U.S. Const. Amend. VI. This right encompasses the right to effective assistance of counsel. *See Strickland v. Washington*, 466 U.S. 668 (1984); *Mayo v. Henderson*, 13 F.3d 528 (2d Cir.1994). In *Strickland*, the Supreme Court announced a two-pronged test to determine if counsel's assistance is ineffective. First, petitioner must show that counsel's performance was deficient. "This requires showing that counsel made errors so serious that counsel was not functioning as the 'counsel' guaranteed by the Sixth Amendment." *Strickland*, 466 U.S. at 687. Counsel's performance is to be judged by an objective standard of reasonableness. *Id.* at 688. Moreover, "judicial scrutiny of counsel's performance must be highly deferential . . . [A] court must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance." *Id.* at 689.

Second, petitioner must show that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Id.* at 694. The court must consider the totality of the evidence before the judge or jury. *Id.* at 695-96. These principles do not establish mechanical rules by which an attorney's performance should be rated. *Id.* at 696. The focus of the inquiry should be on the fundamental fairness of the trial, and whether, despite the strong presumption of reliability, the result is unreliable because of a breakdown of the adversarial process. *Id.*

While this standard was originally applied only to trial counsel, it since has been expanded to appellate

counsel. *See Mayo*, 13 F.3d at 528. The reviewing court should not second-guess the reasonable professional judgment of appellate counsel. *Tsirizotakis v. LeFevre*, 736 F.2d 57, 65 (2d Cir.1984).

Petitioner alleges that his appellate counsel should have argued that the People were barred from advancing a "new theory on appeal," namely, that the police encounter with petitioner constituted an "approach to inquire", when their theory at trial was that the police stopped the petitioner when they drove up to his car. *See* Opp. Decl., Ex. F., Defendant's Memorandum of Law In Support of Motion for Writ of Error Coram Nobis, at 24-25. Petitioner further argues that the trial court "basically changed the theory of the People's case from a stop involving restraint to a mere attempt to inquire of petitioner's activities." *Id.* at 22.

Petitioner's claim of ineffective assistance of appellate counsel is without merit. Petitioner fails to show that the performance of his appellate counsel was so unreasonable that he failed to function as the counsel guaranteed by the Sixth Amendment. At the Mapp hearing prior to trial, defense counsel argued that the seized contraband should be suppressed because the police did not have reasonable suspicion to stop petitioner's car. *See* H at 41. He further argued that the police, at most, were entitled to question petitioner, not to pursue him, when he ran from the car. *See id.* In denying petitioner's motion to suppress, the trial court found that the police were justified in approaching petitioner after he entered the car to "inquire as to his activities." H at 48. Furthermore, the trial court found that the police had reasonable suspicion

to pursue, stop and search petitioner after he fled. *See id.* at 49-50.

Defense counsel challenged the trial court's denial of petitioner's motion to suppress the contraband. In a comprehensive 55-page brief to the Appellate Division, he reviewed the trial proceedings extensively and presented the facts in a manner favorable to petitioner. The substantive arguments were well presented and researched. Counsel argued that because the police officers lacked reasonable suspicion to stop and seize petitioner by blocking his car with their unmarked vehicle, the contraband should have been excluded. *See* Opp. Decl., Ex. B., Brief for Defendant-Appellant, at 27-37. This argument was identical to that raised at the pre-trial Mapp hearing. The Appellate Division held that petitioner's motion to suppress was properly denied, finding that the radio report that guns were being sold from an automobile at a particular location and the confirmatory police observations at the scene provided objective, credible reasons for the police to approach the car and seek information from petitioner. *See People v. Hunter*, 653 N.Y.S.2d 319, 320 (1st Dep't 1997). The court also found that petitioner's flight provided the police with reasonable suspicion that criminal activity was at hand, thus justifying the subsequent police pursuit and stop of petitioner. *See id.*

It was entirely reasonable for appellate counsel to omit an argument that the state changed its theory regarding the basis for the stop. While appellate counsel need not raise every colorable claim or argument, including non-frivolous ones, in order to provide effective assistance, *Jones v. Barnes*, 463 U.S. 745 (1983), appellate counsel is considered ineffective when he or she omits

"significant and obvious issues while pursuing issues that were clearly and significantly weaker." *Mayo*, 13 F.3d at 533. The reviewing court, therefore, may examine whether there was a reasonable probability that the claim, if raised, would have been successful before the state's highest court. *See id.* at 533-34. Petitioner's claim does not meet that test. The comprehensive presentation by counsel regarding the stop of petitioner negates his claim that counsel's performance was deficient under the *Strickland* test.

Similarly, petitioner has not demonstrated that had counsel raised the issue of the People's change of theory, the result of the appeal would have been any different. Thus, petitioner has failed to satisfy the second prong of *Strickland*. Accordingly, the ineffective assistance of counsel claim does not warrant habeas relief.

IV. Conclusion

For the reasons set forth above, Hunter's petition for a writ of habeas corpus is denied. Further, petitioner has failed to make a substantial showing of denial of a constitutional right, and a certificate of appealability therefore is denied. *See* 28 U.S.C. § 2253(c)(2). The Clerk of the Court is directed to close this case.

SO ORDERED:

APPENDIX B

Raynaldo BRANDON, Petitioner,

v.

UNITED STATES OF AMERICA, Respondent.

Nos. Civ.A. 98-1344-AM, Crim. 94-141-A.

United States District Court, E.D. Virginia.

March 2, 2000.

Terrell N. Roberts, III, Riverdale, Maryland, for petitioner.

Tessa M. Gorman, Special Assistant United States Attorney, United States Attorney's Office, Alexandria, VA, for respondent.

ORDER

ELLIS, J.

The matter is before the Court on petitioner's motion to vacate, set aside, or correct his sentence pursuant to 28 U.S.C. § 2255.

Petitioner and three co-defendants were charged in a seven-count indictment with offenses arising out of the prison murder of a fellow inmate at the medium security facility at the District of Columbia Department of Corrections Facility in Lorton, Virginia. The evidence introduced at trial showed that petitioner and his co-defendants attacked the victim outside of their dormitory. Eyewitness accounts stated that one of the co-defendants grabbed the victim from behind and held him while petitioner and another co-defendant fatally stabbed the

victim in the head and chest. Initially, petitioner claimed to be in Arabic language class at the time of the stabbing. At trial, however, petitioner presented an alibi witness who stated that he and petitioner were watching a movie at the time of the murder.

Petitioner was convicted on July 20, 1994, of (i) conspiracy to commit murder, in violation of 18 U.S.C. § 1117, (ii) murder, in violation of 18 U.S.C. §§ 1111, 1112, and (iii) possession of contraband, to wit: a "shank," in violation of 18 U.S.C. § 13, assimilating 53.1 Virginia Code § 203(4). Petitioner appealed his conviction to the United States Court of Appeals for the Fourth Circuit, which denied his appeal on March 1, 1996. *See United States v. Smith, et al.*, 78 F.3d 580, 1996 WL 88056 (4th Cir. March 1, 1996) (unpublished disposition). Petitioner then filed a petition for writ of certiorari to the United States Supreme Court, which was denied on May 13, 1996. *See Smith et al. v. United States*, 517 U.S. 1199 (1996). The instant § 2255 motion was filed here on September 10, 1998.

Petitioner attacks his conviction on three separate grounds. First, petitioner claims that he was denied effective assistance of counsel because his trial counsel failed to interview, or call at trial, known witnesses who, it was later revealed, had information that allegedly exculpated petitioner. In his direct appeal to the Fourth Circuit, petitioner claimed that the government withheld allegedly exculpatory information contained in six summary reports of witness interviews conducted by the FBI in violation of *Brady v. Maryland*, 373 U.S. 83 (1963). The Fourth Circuit rejected this claim on the ground that,

even assuming the reports contained exculpatory material, the government's failure to disclose them did not violate *Brady* because defense counsel knew of the witnesses and could have interviewed them himself, and "*Brady* does not compel the disclosure of evidence available to the defendant from other sources, including diligent investigation by the defense." *Smith*, 1996 WL 88056, at *4. Seizing on this result, petitioner now claims that his counsel was deficient for failing to interview and call at trial the six witnesses who allegedly possessed the exculpatory information.

Second, petitioner claims that the prosecution's failure to disclose fully the six FBI witness reports was a violation of the *Brady* rule.

Finally, petitioner claims that he was denied his Sixth Amendment right to confrontation as articulated in *Gray v. Maryland*, 523 U .S. 185 (1998). At trial, the government sought to introduce a statement by one of petitioner's co-defendants that implicated co-defendant Smith. To comply with the dictates of *Bruton v. United States*, 391 U.S. 123 (1968), the trial court redacted the statement by replacing Smith's name with the neutral pronoun "individual." Petitioner objected to this redaction on the ground that it created an unfair inference that he was the individual to whom the statement referred. On appeal, the Fourth Circuit rejected petitioner's argument that the redacted statement unfairly implicated him because the trial court had instructed the jury that the statement could only be used against the co-defendant who made the statement. *See Smith*, 1996 WL 88056 at *3. In 1998, the Supreme Court issued its opinion in *Gray v. Maryland*, which held that the *Bruton* protective rule applies to

redacted confessions where the redactions simply replace a name with an obvious blank space, a word such as "deleted," or other similarly obvious indications of alteration. *See Gray*, 523 U.S. at 188. Petitioner now argues that *Gray* constituted a new rule of constitutional criminal procedure which redefines an accused's fundamental rights under the Confrontation Clause, and as a result, he is entitled to a new trial.

Before the merits of petitioner's motion can be addressed, it is necessary to resolve the threshold question of the motion's timeliness. Under the Antiterrorism and Effective Death Penalty Act ("AEDPA"), a motion for post-conviction relief must be filed within one year of the date the conviction becomes final. *See* 28 U.S.C. § 2255. In this circuit, a conviction becomes final for purposes of § 2255, on the date when the petitioner can no longer seek direct review. *See, e.g., United States v. Walker*, 165 F.3d 22, 1998 WL 756928 (4th Cir.1998) (unpublished disposition) citing *United States v. Simmonds*, 111 F.3d 737, 744 (10th Cir.1997) (deciding that conviction became final after the Supreme Court denied certiorari); 28 U.S.C. § 2244 (providing, for motions attacking state court convictions, that a judgment becomes "final by the conclusion of direct review or the expiration of the time for seeking such review"). An appellant's direct review procedure terminates when his or her petition for certiorari is denied or when the deadline for seeking a writ of certiorari has expired. *See Lambrix v. Singletary*, 520 U.S. 518 (1997); *Allen v. Hardy*, 478 U.S. 255, 258 n. 1 (1986). *See also United States v. Forbes*, 153 F.3d 123, 1998 WL 486339 (4th Cir.1998) (finding conviction became final 90 days after Fourth Circuit's affirmance of district court's judgment of

conviction and barring petition as untimely); *United States v. Dorsey*, 988 F.Supp. 917, 918 (D.Md.1998) (noting growing consensus and holding that conviction becomes final for purposes of § 2255 when petitioner can no longer seek direct review).

Here, the direct review terminated when the petition for certiorari was denied on May 13, 1996, more than one year before petitioner filed the instant motion. This fact, the government argues, compels dismissal of the petition as time-barred. Petitioner concedes that his conviction became final on that date, but argues that the statute of limitations should be equitably tolled because neither he, nor his counsel, were notified of the Supreme Court's denial of certiorari until September 10, 1997, and the instant petition was filed within one year of that date.

The questions presented, then, are (i) whether the AEDPA's one-year statute of limitations is a procedural bar, as opposed to a jurisdictional bar, and thus subject to equitable tolling, and (ii) if so, under what circumstances is equitable tolling applicable. The Fourth Circuit has not addressed either issue. Courts elsewhere however, have determined that "equitable tolling is appropriate under the AEDPA . . . if extraordinary circumstances beyond a prisoner's control make it impossible to file a petition on time." *Furr v. Robinson*, 2000 WL 152147, at *2 (E.D.Va. Jan. 13, 2000); *see also Moore v. United States*, 173 F.3d 1131, 1133 (8th Cir.1999); *Kapral v. United States*, 166 F.3d 565, 567 (3d Cir.1999); *Calderon v. United States Dist. Ct.*, 163 F.3d 530, 541 (9th Cir.1998); *United States v. Griffin*, 58 F.Supp.2d 863, 868 (N.D.Ill.1999). There is further authority to suggest such extraordinary circumstances exist when the prisoner is unaware that his conviction has

become final until after the one-year limitations period has expired. *See Baskin v. United States*, 998 F.Supp. 188, 190 (D.Conn.1998) (one-year statute of limitations equitably tolled when petitioner's counsel failed to notify him of the denial of certiorari until thirteen months after it occurred); *see also Vasquez v. Grenier*, 68 F.Supp.2d 307, 310 (S.D.N.Y.1999) (factual dispute as to when petitioner first learned of the finality of his conviction precluded dismissal of the petition as untimely).

Here, petitioner claims that neither he, nor his counsel, received notice of the denial of certiorari until September 1997, after the one-year limitations period had expired. Specifically, petitioner's counsel on direct review has averred that he was not notified of the denial of certiorari until September 10, 1997 when he contacted the Supreme Court. Additionally, petitioner's current counsel, Christopher Griffiths, avers that, in August 1998, he reviewed the file in *James Smith, et al. v. United States of America*, Docket No. 95-8542, and found that the file contained a copy of notice of the denial of certiorari sent to counsel for James Smith, petitioner's co-defendant, but no correspondence or other documentation in the file indicated that petitioner or his counsel were notified of the denial of certiorari. The government does not refute the fact that petitioner did not receive either actual or constructive notice of the denial of certiorari until after the limitations period expired. As petitioner, though no fault of his own, first learned of the outcome of his final appeal after the time for seeking habeas review had expired, equitable tolling is appropriate in this case. *See Vasquez*, 68 F.Supp.2d at 310.

The government argues unpersuasively that equitable tolling is not warranted because the denial of certiorari is a public record which petitioner could have accessed any time before the limitations period expired. No supporting authority for this argument was cited,[1] nor has any been found. This is not surprising, for the argument, if accepted, would lead to an absurd result: courts would have no reason to provide notice of their decisions in these matters because prisoners, like petitioner, who have no meaningful access to court records,[2] would be deemed to know the contents of such records. Merely because court decisions are matter of public record is not a sufficient reason to assume that litigants who have no meaningful access to such records are aware of the court decisions that affect their cases. Absent reasonable notice of the decision rendering petitioner's conviction final, it is inequitable to begin the one-year statute

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[1] The sole case cited by the government on this issue, *United States v. Lacey*, 993 F.Supp. 831 (D.Kan.1998), does not support the government's argument and is easily distinguished. In *Lacey*, the petition for the writ of certiorari was denied on October 15, 1996, although petitioner did not receive notice of the decision until five or six days later. Petitioner subsequently filed his § 2255 motion on October 20, 1997, more than one year after his conviction became final. Because the petitioner had ample time to file his petition despite the delay in receiving notice – 360 days as opposed to 365 – the district court declined to apply equitable tolling. *See Lacey*, 993 F.Supp. at 834. By contrast, petitioner here, unlike the *Lacey* petitioner, did not even learn of the denial of certiorari until after the one-year limitations period had passed. Unlike the petitioner in *Lacey*, who had 360 days to file a timely petition, this petitioner never had an opportunity to file a timely petition.

[2] *See Vasquez*, 68 F.Supp.2d at 310.

of limitations period on the day petitioner's conviction became final.

Accordingly, it is hereby ORDERED that the motion to vacate sentence pursuant to 28 U.S.C. § 2255 is not barred as untimely. As a result, the merits of petitioner's claim must be examined.

Because a response from the government would aid in evaluating the merits of the petition, the government is DIRECTED to file a response to the petition by 5:00 p.m., Friday March 17, 2000. Petitioner may file a reply by 5:00 p.m., Friday March 31, 2000.

The Clerk is directed to send a copy of this Order to petitioner and all counsel of record, and to send copies of this Order and the relevant pleadings in this matter to the United States Attorney for this District.